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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 463

STEWART L. UDALL, SECRETARY OF THE INTERIOR, *Petitioner,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY IN OPPOSITION

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Question Presented

The Federal Power Commission, under section 7(b) of the Federal Power Act, decided not to recommend federal development of the High Mountain Sheep hydroelectric project on the ground that the evidence established that such development would not be preferable to development under license both because federal development would not provide any superiority and because federal development would not occur in time to meet the early need for power from the

project. The question is whether, in so deciding, the Commission abused its discretion.[1]

Statement

Two petitions for certiorari have been filed seeking to overturn the Federal Power Commission's grant of a license to respondent Pacific Northwest Power Company (Pacific Northwest) to construct and operate a hydroelectric project at the High Mountain Sheep site on the Snake River. In No. 462, Washington Public Power Supply System (Washington Supply System), a competing applicant, contends that the Commission erred in according Pacific Northwest a priority under section 5 of the Federal Power Act, 16 U.S.C. 798. We deal with that issue in our separate brief in opposition in No. 462. In No. 463, in opposition to both Pacific Northwest and Washington Supply System, the Secretary of the Interior raises an entirely different contention—that under section 7(b) of the Act, 16 U.S.C. 800(b), the Commission should have made a further record before determining that federal development of the High Mountain Sheep site was not preferable to private development. That is the issue we treat here.

The Secretary's position depends fundamentally upon his assertion that the record before the Commission "lacked evidence to support an informed and reasoned judgment" upon the section 7(b) question for the reason that "neither the Commission's staff, the competing applicants, nor the Secretary of the Interior introduced evidence on the question" (Pet. 11), and upon his contention that the Commission recognized the inadequacy of the record but concluded that it had no obligation to build a full record before making a section 7(b) determination (Pet. 8, 11, 12-13, 14-15, 17).

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[1] If certiorari is granted, respondent will request the Court to consider also the question whether the Commission's determination under section 7(b) is justiciable.

The record lends no support whatever either to the Secretary's version of the facts or to his conception of the Commission's rationale. The record includes substantial, indeed voluminous, evidence on each of the issues raised by the Secretary supporting the Commission's decision. Furthermore, the record demonstrates that the Commission was diligent in seeking the views of the Secretary, that it was tolerant to a fault of the Secretary's delays, and that in consequence the Secretary was able to, and did, present a great deal of relevant data to the Commission. The Commission made its section 7(b) determination, not by way of a penalty assessed against the Secretary or on the notion that the record was incomplete, but rather because the large body of relevant evidence indicated that federal development was not preferable to private development.

1. *Participation by the Secretary prior to the Examiner's recommended report.* Pacific Northwest applied for its license on March 31, 1958. On October 21, 1959, the Commission invited the Secretary to report on the application within 60 days (J.A. 236-238).[2] On December 1, 1959, the Secretary sought an extension of time until April 1, 1960, to complete his report, particularly with respect to the protection of fish and wildlife (J.A. 243). On March 15, 1960, Washington Supply System applied for a license for the Nez Perce site, which was alternative to, and hence competitive with, Pacific Northwest's proposed project. The Commission, ten days later, sought the Secretary's comments on the Washington Supply System application (J.A. 256-257). About five months later, the Commission again solicited the Secretary's views, this time requesting a reply "as soon as possible" (J.A. 277-278).

On November 21, 1960, exactly thirteen months after the

[2] "J.A." references are to the joint appendix filed in the Court of Appeals.

Commission's original request and after hearings on the applications had commenced, the Secretary submitted the first of what developed to be several different approaches by the Department of Interior to the High Mountain Sheep and Nez Perce applications (J.A. 126-136). In this initial submission, the Secretary took the position that, because power resource forecasts indicated that sufficient power would be available for at least five or six years, any project in the Middle Snake River area should be deferred "for some years to come" pending further research into methods of handling anadromous fish (J.A. 126). The Secretary's letter was placed in evidence (J.A. 137), but the hearing continued.

Next, on March 25, 1961, the Secretary revoked permission previously granted to Department personnel to appear as witnesses in the proceedings and requested that the Commission recess the hearings until the Department completed a "crash program" to study fish passage facilities (J.A. 138-140). The suggested recess was until the end of 1964, a delay of almost three years (J.A. 139). According to the Secretary, "potential alternative sources of new power" made such a delay prudent (J.A. 139). Thus, almost three years after Pacific Northwest had filed its application, the Secretary had yet to suggest the possibility of a section 7(b) recommendation for federal development and was of the opinion that another three years should elapse before the construction of any project should even be considered.

No further statement was made by the Secretary until June 28, 1962, four and one-quarter years after commencement of the proceeding and nine and one-half months after the hearing had been concluded—a hearing that produced 14,327 pages of transcript compiled from the testimony of 77 witnesses plus 633 documentary exhibits. At that point, in June of 1962, the Secretary, for the first time, notified

the Commission that the Department believed the Commission should recommend to the Congress that the High Mountain Sheep Dam be built by the United States (J.A. 309-313). Seven considerations were advanced to support this contention. The Secretary claimed that a federal project would (1) produce better coordinated and consequently greater storage benefits, (2) assure more effective fish passage facilities, (3) better protect navigation requirements, (4) provide less costly power, (5) allow more intimate coordination with projects downstream on the Columbia River,[3] (6) avoid payments to a nonfederal licensee, and (7) better preserve the fishery and recreational resources of the Salmon River.[4]

The Commission *sua sponte* ordered the record reopened for the purpose of including the Secretary's letter (J.A. 314-315), which stated the case for federal development that the Secretary was later to elaborate in approximately 160 pages of the record before the Commission.[5] The Commission also permitted the parties to file supplemental briefs directed to the Secretary's letter and commanded the examiner to give consideration to the Secretary's statement and any additional arguments of the parties with respect thereto (J.A. 314-315).

2. *Relevant data introduced by parties other than the Secretary.* During the hearing a great mass of evidence was introduced that was relevant to the issue of federal development. Under the exacting standards of section 10(a), 16 U.S.C. 803(a), the applicant is required to show that the project "will be best adapted to a comprehensive

[3] There is no significant difference between item (5) and item (1).

[4] This was applicable only to the Nez Perce project, not to the High Mountain Sheep project.

[5] J.A. 494-514 equivalent to Commission Record 27657-27686, J.A. 523-605 equivalent to Commission Record 27791-27901, J.A. 718-748 equivalent to Commission Record 28915-28947.

plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes. . . ." Accordingly, each party presented extensive oral and documentary evidence relating to each of the factors subsequently identified by the Secretary as of prime importance—power, coordination, cost, fish preservation, flood control and navigation, and recreation.[6] And after the Secretary raised the section 7(b) issue in his letter of June 28, all parties, including the Commission staff, filed supplemental briefs opposing federal development.[7]

3. *The examiner's decision.* On October 8, 1962, the examiner rendered his decision granting Pacific Northwest's application and declining to recommend federal development of the project (J.A. 315-491). The examiner

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[6] For material introduced as part of the parties' direct evidence, see *e.g.*, the following: Power and Coordination: 146-148, 192-193, 275-357, 428, 640-717, 1565, 1760, 1868-1870, 1909-1910, 14770, 14782-14784, 15044-15117, 15785-15802, 16504-16511, 16800-16802; Fish Preservation: 337-357, 432, 734-817, 876-927, 1210-1488, 1772, 14917-14929, 15412-15416, 15443-15493, 15811-15821, 16268-16293, 16380-16399, 16402-16403, 16407-16410, 16417-16421, 16460-16466, 16468; Flood Control and Navigation: 148, 287-288, 429, 14841-14844, 15135-15137, 16543-16546; Cost: 15118-15121, 15138-15139, 15147-15154, 15497-15505, 15803, 15823-15827, 16039, 16227, 16259-16264, 16358, 16374-16377, 16489-16497, 16500-16503, 16533-16542, 16785-16803; and Recreation: 149-151, 431, 720-733, 1959, 14845-14858, 15809-15810, 16556-16584. (All references are to the full Commission Record.)

[7] Idaho Fish and Game Commission and Idaho Fish and Game Department, Idaho Wildlife Federation, Oregon State Game Commission and Fish Commission of the State of Oregon, Oregon Wildlife Federation, Washington State Sportsmen's Council, Inc., Department of Fisheries of the State of Washington and Department of Game of the State of Washington, Department of Conservation of the State of Washington, Columbia River Salmon and Tuna Packers Association, Fishermen's Cooperative Association, Inc., Pacific Fish Conservation League, Inc., Alaska Fishermen's Union, Northwest Fisheries Association, State Water Resources Board of the State of Oregon, Makah Indian Tribe, Confederated Bands and Tribes of the Yakima Indian Nation, Washington Public Power Supply System, Pacific Northwest Power Company.

reviewed in detail the material on the issue of federal development and fully analyzed the merits of the Secretary's contentions with respect to power and coordination (J.A. 432-435), fish passage (J.A. 435-437), navigation and flood control (J.A. 437), cost (J.A. 437-439), and payments to a non-federal licensee (J.A. 439). He concluded:

> ". . . [C]onstruction and operation of the High Mountain Sheep Project under license by the Commission will effectuate comprehensive development in the public interest on a comparable basis with Federal development. There is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary" (J.A. 439-440).

In addition, the examiner decided that the improbability of reasonably prompt development of the project by the federal government was an important factor relevant to the section 7(b) question. After analyzing this aspect of the matter in some detail, he concluded:

> "In summary, the Secretary is asking the Commission to recommend Federal construction of a project, the details of which have not been engineered or described by the Department of the Interior, and which it has not recommended for construction now to the Administration or to the Congress. Moreover, the Secretary's latest letter of June 28, 1962, proposing Federal development does not indicate any present intention to press forward for early construction or development. . . . In these circumstances, and in view of the united opposition to Federal development, as evidenced by the briefs filed herein, of local interests in the Pacific Northwest both private and public, it would appear that there is far less likelihood that

Federal development would be authorized by the Congress for High Mountain Sheep in the foreseeable future than there was in the Roanoke Rapids or the Hells Canyon cases [where the Commission relied upon that type of consideration]" (J.A. 441-442).

4. *Further data introduced by the Secretary.* After issuance of the examiner's decision, the Secretary filed a petition for intervention (J.A. 494-514), a motion for leave to intervene out of time (J.A. 515-517), and a motion for extension of time within which to file exceptions (J.A. 518-520), each of which was promptly granted by the Commission (J.A. 521-523). In his petition, the Secretary urged the Commission to recommend federal development of the High Mountain Sheep Dam "at an appropriate time" (J.A. 495) and founded his case primarily upon the need for maximum coordination of the major storage facility with federal generation facilities downstream (J.A. 495-499, 501). As an alternative basis for protesting the license grant, the Secretary contended that complete coordination required more detailed provisions in the license than those proposed by the examiner (J.A. 499-500, 513). The Secretary also summarized his position on fish protection (J.A. 506-508), flood control and navigation (J.A. 508), and cost (J.A. 509). The petition concluded by urging the Commission either to make a section 7(b) recommendation or to revise the license issued to a non-federal party. It did not contain any request to reopen the record to adduce further evidence in support of federal development or any suggestion that the Commission lacked adequate evidence upon which to act.

The case for federal development was presented in even more copious detail in the extensive exceptions the Secretary filed to the examiner's decision (J.A. 523-605). These exceptions explored each of the reasons previously advanced on behalf of federal development and brought "to the Commission's attention in specific terms the effects which non-

federal construction has had in the past and the effects which should be expected from the proposed project" (J.A. 543). The Secretary recited the facts underlying his position, facts "based upon official records of the Commission and other matters of which the [Commission] may take official notice under §1.26(d) of the Commission's Rules of Practice and Procedure, to-wit: official government reports, censuses of the United States, Federal Power Commission reports, Department of the Interior reports, and geographical facts" (J.A. 543-544). The Secretary explained in detail the basis of his claim that federal development would be preferable because of low cost (J.A. 554-559), coordination (J.A. 574-578, 595-602), flood control and navigation (J.A. 578-580), fish passage facilities (J.A. 580-586), and recreation (J.A. 587-590). The Secretary relied upon evidence of record and did not suggest that the record was in any respect deficient, with the single exception that he requested the Commission to take official notice of the authorization of nine generating plants after the closing of the record—a factor he thought relevant to his contention that a new facility was not needed (J.A. 590-591). The Commission granted that request (J.A. 613, 665; App. 2a).

5. *The Commission's decision.* The Commission, considering these exceptions, an oral argument on behalf of the Secretary (J.A. 27-55), and the rest of the extensive record, issued its opinion awarding the High Mountain Sheep project to Pacific Northwest. The Commission was unanimous in declining to recommend federal development of the project (J.A. 664-669, 686, 716; App. 1a-5a). (For the convenience of the Court, we have attached as an appendix hereto the passages from the Commissions opinions specifically relating to federal development.)

On the question of federal development, the Commission examined and rejected each of the Secretary's arguments. Thus, it stated that "[t]he proposed project will pro-

vide substantial recreational opportunities"; that flood control and navigation, while not of major significance, in any event would be secured through license provisions recommended by the Army Chief of Engineers; and that, considering the record and the license provisions giving the Commission continuing authority to require any action necessary to protect fish, there was "nothing to lead us to believe that the Federal Government could do more." As to coordination, the Commission discussed the matter fully, noting the evidence respecting project design and the past coordination performance of the companies owning Pacific Northwest, together with the protective license provisions it inserted to meet the Secretary's request (*supra*, p. 8), and concluded that there would be effective coordination (J.A. 664-669, 785; App. 1a-5a, 9a).

After this analysis of each of the relevant factors, the Commission concluded that, "on the basis of the record here, plus such information of which we can take official notice, there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to [Pacific Northwest] even assuming that the actual choice we had before us was between federal construction now and non-federal construction now" (J.A. 668; App. 4a). But, the Commission continued, that was not the choice, for the "Department of Interior has frankly admitted that it has no present intention of seeking authorization to commence construction or planning. . . ." Thus, "the delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (i.e., superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized." The Commission concluded: "Neither the record nor our general knowledge of the Columbia River

System disclose any major benefits which would result from federal construction over that by [Pacific Northwest]" (J.A. 668-669; App. 4a-5a).

In his petition for rehearing, the Secretary, having failed to persuade the Commission, sought for the first time to present more evidence (J.A. 747-748). Even then, he did not describe what evidence he wished to introduce.[8]

On April 30, 1964, the Commission issued a supplementary opinion and order on rehearing in which it adhered to its original opinion and dealt with the Secretary's objections to the efficacy of several articles included in Pacific Northwest's license to assure optimum flood control and power coordination (J.A. 780, 781-786, 800; App. 6a-10a).

6. *Judicial review.* In the Court of Appeals, the Secretary contended that the Commission's determination respecting federal development was wrong on the merits, and also that the Commission had erred in not requiring an independent staff study on the issue and in not permitting the Secretary to offer evidence. In affirming, the Court did not advert specifically to the staff study question. It did, however, conclude that the Commission's section 7(b) determination was not arbitrary, and that indeed "the Commission was amply justified in refusing to recommend federal development and in issuing a license for private construction." As to the Commission's failure to reopen the record, the Court stated:

> "Suffice it to say that [the Secretary's] long delay . . . was sufficient to warrant denial of his motion [to intervene]. Nevertheless, the Commission permitted intervention limited to the filing of exceptions to the examiner's decision and participation in oral argument before it. Various communications from the Secretary

[8] The nearest to a specific description is the Secretary's reference to "evidence regarding river operations without coordination and under varying types, modes, and degrees of coordination" (J.A. 737).

were admitted in evidence. In these circumstances, we think the Secretary has no cause to complain that he was not permitted to introduce evidence which he has not proffered or described'' (Pet. App. A, 37-38) (footnote omitted).

Argument

The question asserted by petitioner to warrant review —whether the Federal Power Commission has an independent responsibility to secure evidence on issues of public importance where that evidence is not presented by the parties—is not involved in this case. As we show below, the Commission did not disclaim such a responsibility, but rather was of the view that the evidence before it was adequate. Thus, the only issue that could be raised would be whether the Commission's evaluation of the record was arbitrary. Such an issue, however, would have no general importance, and this Court has repeatedly indicated that it does not sit to review the sufficiency of the evidence supporting agency decisions. *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491. Moreover, the fact is that the record fully warranted the Commission's decision. Finally, even this narrow question of sufficiency of the evidence would not be reached in this case. The Commission placed its section 7(b) determination, not only upon its judgment that the evidence did not establish the superiority of federal operation, but also, and independently, upon the ground that there was no prospect of federal development of the project by the time the power would be needed. This ground is entirely adequate to support the decision.

1. Petitioner's main effort is to frame the question in terms of determining whether the Commission has any independent obligation to secure facts upon which an informed section 7(b) judgment can be made. Thus petitioner states:

> "... The basic question is whether and to what extent the Commission has an independent and affirmative responsibility to gather evidence on issues affecting the public interest where the parties before it are remiss in doing so. Is the Commission no different from a court, which decides controversies between litigants on such evidence as they may care to adduce? Or—as we believe—must the Commission, if the parties do not offer necessary evidence on matters affecting the public interest, obtain such evidence independently through its staff? This issue has general importance. ..." (Pet. 12-13).

This might be a question worthy of review in a case where the Commission, acknowledging the dereliction of the parties in building a section 7(b) record, nonetheless disclaimed any obligation to see that adequate data was obtained. But this is certainly not such a case.

On any fair reading of the Commission's discussion of the section 7(b) question, both in its initial opinion and in its opinion on rehearing, it is evident that the Commission considered that it had an adequate basis for a section 7(b) judgment. Petitioner suggests that this is not true, and that in fact the Commission recognized the inadequacy of the record (Pet. 8, 11, 14-15). But petitioner does not read the opinions fairly. Not only does he center upon a single passage in the Commission's initial opinion, but he unaccountably deletes the portion of that passage that gives it a meaning incompatible with his interpretation.

Thus, petitioner's version of the Commission's treatment of the coordination question is this, and no more:

> "As for the co-ordination problem, the Commission stated (*ibid.*): 'We agree that the Secretary (or any single operator) normally would have a superior ability

> to coordinate the operations of [High Mountain Sheep] with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter * * *.'" (Pet. 8).

And again, in urging the *prima facie* desirability of federal operation in terms of coordination, petitioner represents that the Commission admitted that "there is no evidence upon which we [the Commission] can determine the scope or the seriousness of the matter." (Pet. 14-15).

The unexpurgated sentence in the Commission's report, together with the ensuing sentences also ignored by petitioner, are as follows:

> ". . . We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS [High Mountain Sheep] with other affected projects on the river. But there is no evidence upon which we can determine the scope or seriousness of this matter *in the context of a river system which already has a number of different project operators and an existing co-ordination system, i.e., the Northwest Power Pool.*[39] The parties comprising [Pacific Northwest] are among those having projects on the river. They are members of the Pool and their record of cooperation is good. [Pacific Northwest] has designed its project to be operated and co-ordinated with the Northwest Power Pool in order to benefit all members. To implement this co-ordination and operation we shall use a provision substantially as found in the Wells Project license [footnote omitted] as requested by both [Pacific Northwest] and the staff, to

[39] "This Pool is a voluntary arrangement among utilities, both public and private in the Pacific Northwest area, including BPA [Bonneville Power Administration] for the co-ordination and operation of their affected systems" (J.A. 667-668; App. 4a).

provide that the licensee shall operate the project in complete co-ordination with the Northwest Power Pool. We have continuing jurisdiction and will insist that this be done. The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development'' (emphasis upon portion of sentence omitted by petitioner) (J.A. 667-668; App. 3a-4a).

The sentence relied upon by petitioner, when read in its entirety, establishes that, contrary to petitioner's contention, the Commission was not admitting that the petitioner might well have a valid point respecting coordination which the Commission was unable to consider because of the state of the record. Rather, the Commission was simply saying that there would be an argument in favor of federal control *if* all of the other related projects on the river system were federal, but that, in view of (a) the mixed character of existing facilities, and (b) the presence of an established system of coordinating those facilities, the petitioner's contention was quite speculative. And the ensuing sentences indicate that the Commission considered it had a fully adequate evidentiary basis upon which to dispose of the matter. Similarly, an examination of petitioner's other quotations from the Commission's opinion (Pet. 8) to the effect that there was ''no evidence'' shows that the Commission was not, as asserted by the Secretary, stating that there was ''no evidence'' relating to the section 7(b) question but rather simply that there was ''no evidence'' that federal construction would be superior to construction under license. In short, nothing in the Commission's opinion supports the notion that the Commission regarded the record as incomplete but thought it had no obligation to secure additional information.

The Commission, moreover, has within the year expressly

represented to this Court that it believes it is obliged to secure independent evidence respecting issues of public interest where the record is inadequate. In a Memorandum of April, 1966, filed in No. 1159, 1965 Term, *Consolidated Edison Co.* v. *Scenic Hudson et al., cert. denied,* 384 U.S. 941, the Commission, in explaining why it had not sought review of a lower court opinion setting aside a Commission order, stated that it was "in complete agreement" with the "primary holding of the court below . . . that the Commission's duty . . . embraces a positive responsibility to canvass all facets of the public interest . . ." (p. 2). The Commission continued:

> "Nor does the Commission believe that its role in the licensing process is limited to that of an umpire evaluating the contentions of the parties and the evidence which they proffer. In keeping with the Act's scheme, the Commission consults the expert opinions of competent federal and State authorities in such matters as navigation, flood control, protection of fishery resources, recreation, and control of pollution. It is well aware, moreover, that the ultimate responsibility rests with it and that only its positive efforts will assure optimum development of the nation's waterways. We note that in this case it was the Commission staff which developed and presented upon the record alternative routes for the primary transmission lines—routes which the staff believed would obviate problems presented by the applicant's plans. We fully agree, then, with the court below that where, as here, a formal hearing on an application is required, it is indeed incumbent on the Commission to make certain that an adequate record is made on all significant issues in controversy."

We note also that in *Scenic Hudson* the author of the opinion in the case at bar, Commissioner Ross, stated: "This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in a manner not possible for the uninformed and poorly financed public." 33 F.P.C. 428, 463. It is improbable, to put it conservatively, that the Commissioner regarded that principle as somehow inapplicable to the section 7(b) question here.

In short, there is no evidence that the Commission thinks it is not obliged to inform itself fully prior to making section 7(b) determinations. The question asserted by petitioner to require resolution simply does not exist.

2. Petitioner makes a further, related argument: "The Commission seemingly—and the reviewing court certainly—attached decisive significance to the Secretary's failure to introduce detailed evidence in support of his plea for federal development" (Pet. 11). But, says petitioner, "the failure of the Secretary of the Interior to make timely application for leave to present evidence in support of asserted benefits of federal development is not a ground on which the Commission may properly refuse to recommend federal development to Congress. The responsibility for judgment in this area is the Commission's, not the Secretary's; the interest involved is the public's, not the Secretary's" (Pet. 13-14).

This, of course, has a nice ring to it and is perfectly true, but it has nothing to do with the issues of this case as measured by the opinions of either the Commission or the Court of Appeals. Evidently the principal basis for petitioner's conclusion that the Commission "seemingly" felt relieved of its obligations by the default of the Secre-

tary is the truncated quotation we have already discussed. There is nothing else cited by petitioner except the Commission's observation at another point that the Secretary had not presented evidence (J.A. 665; App. 1a). But a reading of the Commission's full discussion of the section 7(b) issue does not in any respect support an inference that the Commission refused to make a recommendation for federal development because of "the failure of the Secretary . . . to make timely application for leave to present evidence. . . ." (Pet. 13). Rather, the Commission decided the matter on the data it had, and there is no indication it thought that data insufficient. The Commission can hardly be faulted for adverting incidentally to the fact that the Secretary was not able to produce any persuasive evidence supporting his view. It was entirely reasonable for the Commission to have considered that the correctness of its section 7(b) judgment was supported by the inability of the Interior Department to adduce substantial countervailing evidence.

As to the opinion of the Court of Appeals, the petitioner misreads it. While that Court, as we have noted, did not discuss the question of the necessity of a staff study, it did find on the merits that the Commission was "amply justified" in refusing to recommend federal construction. And it is quite clear that the Court did not rule that the Commission was absolved of a responsibility it might otherwise have had because of the default of the Secretary. All that the Court said in connection with that default was that the Commission, which had admitted into evidence a number of the Secretary's communications, had no obligation to reopen the record to permit the Secretary "to introduce evidence which he has not proffered or described" (Pet. App., 37-38). Surely no substantial case for certiorari can be mounted on that limited, and plainly correct, determination.

3. If then, as we believe, there is no dispute as to the Commission's obligation to insure that it has an adequate record, the only question is whether the Commission's view that the record was adequate in this particular case is supported by substantial evidence. Such a question, as we have indicated, is not of sufficient consequence to warrant yet another review of the Commission's action. However, since the petitioner repeatedly asserts that the record was non-existent—"neither the Commission's staff, the competing applicants, nor the Secretary of the Interior introduced evidence on the [section 7(b)] question" (Pet. 11)—we discuss this point briefly.

Petitioner, in characterizing the record as devoid of evidence, has overlooked a great mass of data relavant to each claim of federal superiority, data that was introduced not only by all of the parties and the Commission's staff, but also by petitioner himself. The record before the Commission contained over 160 pages of material in which petitioner set forth his case for federal development (J.A. 494-514, 523-605, 718-748), nine briefs marshalling evidence in reply, 17 separate communications between petitioner and the Commission (J.A. 126-140, 236-238, 243, 256-257, 277-278, 280-283, 309-315, 494-605, 718-748), petitioner's oral argument (J.A. 27-55), facts of which the Commission took judicial notice (J.A. 543-544, 668; App. 4a), and voluminous material from the competing applicants with respect to the factors governing the best possible development of water resources under section 10(a) (see references collected at p. 6 n. 6, *supra*). Those factors encompassed each of the considerations advanced by petitioner as decisive and enabled the Commission to compare the advantages of non-federal operation with those asserted by petitioner.

With respect to coordination—the subject particularly emphasized by petitioner—the Commission was able to

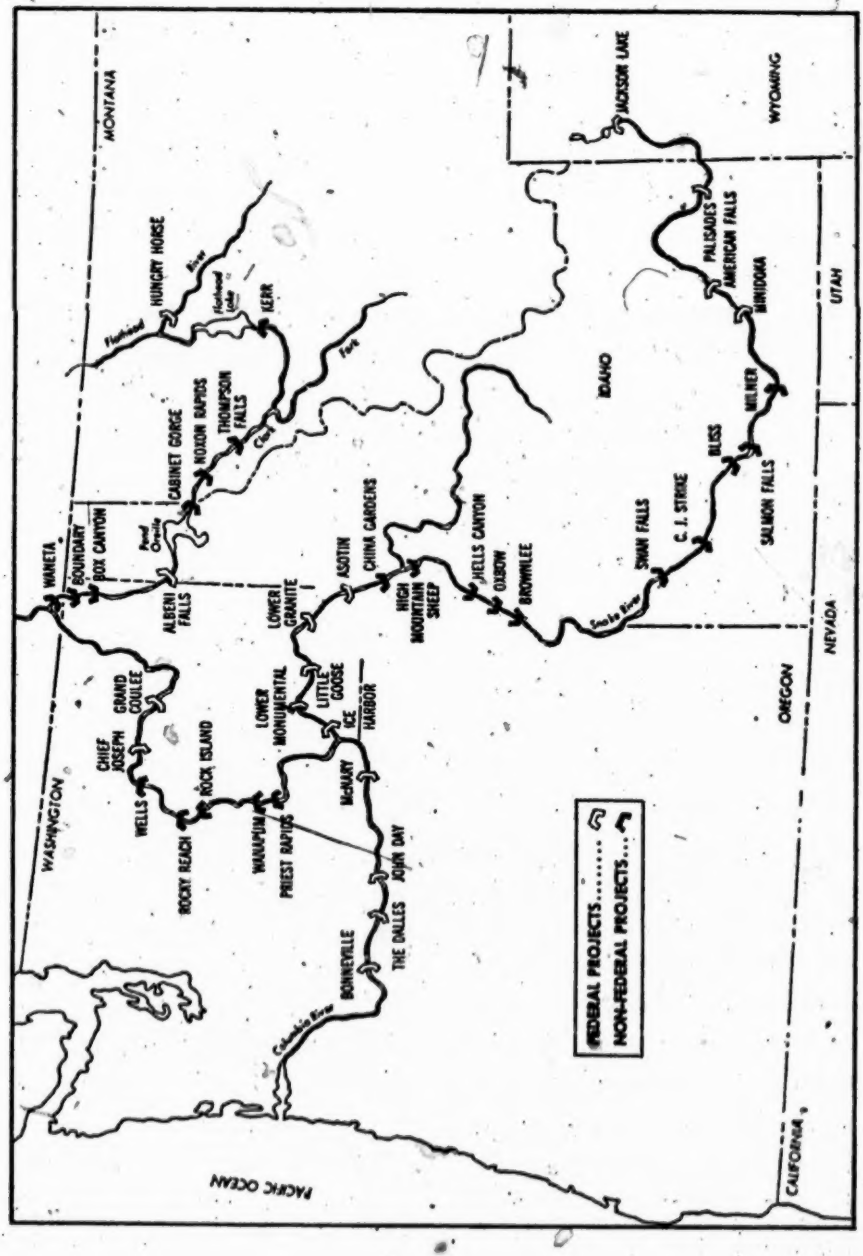
make a fully informed judgment. Before the Commission, as here (Pet. 14), the Secretary based his case primarily upon the *a priori* argument that the interests of any non-federal operator of High Mountain Sheep would inherently conflict with the water flow needs of nine federal dams downstream (J.A. 499, 601). The Commission was aware of the potential loss of downstream power in the absence of successful coordination (J.A. 53-54, 305-306, 499, 503, 596-599, 722, 726, 730-732). The Commission could assess the asserted disadvantages of non-federal development against the background of the coordinated operation of the entire river system, which includes not merely the nine federal dams petitioner refers to, but projects, public and private, upstream of High Mountain Sheep, projects, public and private, on the Columbia River System, and projects, public and private, on the Skagit, Baker, Cowlitz, Lewis, Klamath and Williamette river systems as well.[9] We attach hereto a map which, in contrast to the map supplied by petitioner, shows the mixture of federal and non-federal projects on the Columbia river system. All the projects on all these rivers, not just the nine downstream federal projects, must be coordinated with High Mountain Sheep if maximum benefits are to be obtained. Thus, as the Commission concluded, the question is not whether a single operator who is running all related projects in a system should be preferred for a new component project, but rather whether one existing operator or another should be preferred for a new project where the system is mixed and where coordination is being secured through existing machinery (J.A. 667-668; App. 3a-4a).

The Commission also had before it and considered material respecting the effectiveness of the Northwest Power Pool and the Coordination Agreement, under which

[9] In 1975, 18,671,000 acre feet would exist in the system, all upstream of the four major federal dams in the lower Columbia, in addition to the 2,250,000 acre feet of storage at High Mountain Sheep (J.A. 69).

FEDERAL AND NON-FEDERAL PROJECTS

Columbia River and Principal Tributaries



the coordination of all facilities, private and public, has been secured (J.A. 432-435, 668; App. 4a). And it was certainly appropriate for the Commission to take into account the past performance of the companies owning Pacific Northwest as members of that Pool and signatories of that Agreement (J.A. 668; App. 4a). In addition, the Commission found that Pacific Northwest had designed its project to accommodate the requirements of coordination (J.A. 668; App. 4a). Finally, the Commission of course was entitled to take into consideration the fact that it was incorporating into Pacific Northwest's license a provision under which it maintained continuing jurisdiction to require coordination.

The record was also replete with evidence enabling the Commission to evaluate each of the other alleged benefits of federal construction. The force of the navigation and recreation claims could be judged by noting petitioner's admission at oral argument that the non-federal applicants had "done a pretty good job" in this respect (J.A. 53). As to flood control and navigation, the Chief of the Corps of Engineers, the agency with primary jurisdiction over such matters, declared that the project under license would serve "substantially the same" purposes as a federal project (J.A. 58-62). Moreover, Pacific Northwest committed itself to operate the project for flood control as directed by the Corps of Engineers (Comm'n Rec. 148, 1946, 14770-14771), and the Commission exercised its power to incorporate in the license the provisions requiring operation for flood control as suggested by the Corps (J.A. 437, 666-667, 679-681, 782-784; App. 3a, 7a-8a). The strength of the recreation contention was apparent from the Commission staff's evaluation of the rival recreational benefits afforded by the Nez Perce and the High Mountain Sheep projects (J.A. 353-354, Comm'n Rec. 16556-16584), the extensive field report of the Forest Service outlining its views as to the recreation facilities that should be provided (Comm'n Rec. 14845-

14858), Pacific Northwest's adoption and improvement of the Forest Service's plans (Comm'n Rec. 149-150, 1959), and, again, the ability of the Commission to protect the recreational interests of the public by means of a flexible license provision calling for cooperation with all of the appropriate governmental agencies in the preparation of a plan subject to Commission approval and for construction by the licensee of all necessary and desirable facilities (J.A. 667, 678). As the Commission's opinion indicates, the fish problem was explored as thoroughly and exhaustively as any other issue in this case (J.A. 435-437, 506-508, 580-586, 629-640, 667, 681; App. 3a). Finally, the issue of lower delivered cost of federal power was a question of law involving the weight to be accorded a conceded factor, not a question of fact (J.A. 437-439, 666; App. 2a-3a).

In view of this plethora of relevant data, there would be no possible ground for setting aside the Commission's determination as having "no basis in evidence" or as being "devoid of reason"—the applicable standards of judicial review. *Chapman* v. *Federal Power Comm'n*, 345 U.S. 153, 171.

4. Moreover, because of the character of the Commission's decision, the fact is that neither the question of the Commission's independent obligation to secure evidence nor the question of the adequacy of the evidence could be reached in this case. As we have noted, the Commission's section 7(b) conclusion was supported by alternative, and independent, determinations. The first was that the evidence, evaluated in light of the Commission's experience with the river system, indicated that there would be no advantage to federal development even if "the actual choice . . . was between federal construction now and non-federal construction now" (J.A. 664-668; App. 1a-4a). The second ground was that "these are not the true alternatives" because "federal construction . . . is not foreseeable,"

and that "[t]his disadvantage outweighs those benefits which Interior contends would result from federal construction (*i.e.*, superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (J.A. 668-669; App. 4a-5a).

If this second ground is adequate to support the Commission's decision, there is no occasion to consider whether or not the Commission should have secured additional evidence on questions such as coordination. And plainly the factor of a "delay in federal construction [which] would foreclose power coming on the line at a time when it will be required," as the Commission put it, was a wholly reasonable basis for the Commission's action. The decisions in *Chapman* v. *Federal Power Commission*, 345 U.S., at 169, 172, and *National Hells Canyon Ass'n* v. *Federal Power Commission*, 237 F.2d 777, 781 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 924, so establish.

Petitioner evidently appreciates the difficulty, for he attempts to recapture his position by changing his mind once again. Indeed, he asserts that this change of mind has produced a basis for review by this Court. Thus, the Secretary, who at first wanted no High Mountain Sheep project for years to come and then supported federal construction at some indefinite time in the future, now purports to be ready to seek Congressional authorization of a project and asserts that for this reason the record has become "stale" and the Commission's order should be set aside (Pet. 17-18).

Whatever might be said for so drastic an impairment of the finality of administrative proceedings in other circumstances, there is surely no justification for the petitioner's request in this case. In the first place, the fact that the Secretary now is willing to seek legislation is hardly any indication that the Congress is willing to enact it. Moreover, the Secretary does not even represent that the Bureau of the Budget would be prepared to seek ap-

propriations. There is good reason to believe that it would not, for on April 11, 1962, commenting on a Corps of Engineers report which discussed the possibility of Bureau of Reclamation construction of a project at High Mountain Sheep (H.R. Doc. No. 403, 87th Cong., 2d Sess.), the Bureau of the Budget stated: "You are also advised that no commitment can be made at this time as to when any estimate of appropriation would be submitted for the recommended projects, if authorized by the Congress, since this would be governed by the President's budgetary objectives as determined by the then prevailing fiscal situation" (J.A. 441). Thus the Secretary seeks to delay further the construction of a facility for which the Commission found an immediate need, and he does so on the flimsiest sort of basis.

Even more significant, however, is the consideration that if the Secretary now believes that the High Mountain Sheep project is needed and that he can make a persuasive case for federal development, he need only put that case to the Congress. And if he thinks that his change of mind might affect the Commission's views, he can suggest to the Congress that the opinion of the Commission be solicited—as would surely be done in any event. In the *Chapman* case, this Court stated the principles that dispose of petitioner's "staleness" claim:

> "Particularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years. . . . Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development and preclude all further congressional action. The Commission would, as it did here, simply express its judgment that, at the time, private development of the site was consistent with the general conception of the way in which the Roanoke River Basin

should be developed. For, at any time short of the fifty years in which a site automatically becomes available to the Government without compensation, the Government may determine that the public interest makes it more desirable that the project be operated publicly and has the right then, by appropriate steps, to take over the project. 41 Stat. 1071, as amended, 49 Stat. 844, 16 U.S.C. § 807." 345 U.S., at 169-170.

In short, petitioner's proper recourse at this point is not to this Court, but to Congress, where he would ultimately have had to make his case for federal development in any event.

5. Finally, petitioner repeatedly notes that we are dealing here with a big dam—which of course we are—and that if the Commission made a mistake the public will suffer. Indeed, petitioner says that the consequence "will be permanent public injury of formidable magnitude" (Pet. 12). Putting aside the consideration that High Mountain Sheep will be only one of a great number of hydroelectric facilities serving the northwest,[10] surely petitioner's dark prediction overlooks the fact that Pacific Northwest is part of a comprehensively regulated industry. The commands of its license are emphatic and unequivocal. It would disobey them at the risk of loss of the license. 16 U.S.C. 820. It sought and obtained the license with the full knowledge that the Federal Power Act imposed the burden of operating in the public interest as the condition for the privilege of developing a public resource for power. This was the deliberate design of the Act. There should be no presumption that Pacific Northwest will not live up to its obligations

[10] Comparing High Mountain Sheep with the downstream federal facilities alone, the latter will have a capability of 3,897,000 kw of prime power (J.A. 69), of which High Mountain Sheep storage will provide only 53,000 kw (Comm'n Rec. 27336).

nor that the Commission will abdicate its statutory responsibility to protect the public through vigorous and continued exercise of its broad powers under the Act and under the license.

Conclusion

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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